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No. 82-1579

IN THE

Supreme Court of the United States

October Term, 1982

HAYFIELD NORTHERN RAILROAD COMPANY, INC.,
Appellant,

and

STATE OF MINNESOTA,
Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO APPELLEE'S MOTION TO AFFIRM

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INTRODUCTION

The jurisdictional statement sets forth a substantial federal question. The importance of the question presented is amplified by the *amicus* pleadings submitted by the State of Wisconsin and the Iowa Department of Transportation. We nonetheless believe that a brief reply to the appellee's (C&NW) motion to affirm is warranted.

The Hayfield Northern Seeks to Recommence Railroad Service Rather Than to Continue It.

Hayfield Northern wants to recommence rail service on the line in question. To do so, it seeks to condemn the line and obtain anew a certificate of public convenience and necessity from the Interstate Commerce Commission. Respondent has labeled the Hayfield Northern's action an attempt to continue rail service, but service was terminated on the line in 1981 when the ICC issued a certificate of abandonment and there has been no rail service on the line since then. As rail service had been discontinued before Hayfield Northern commenced its action, rail service could not possibly be continued by it, but only recommenced. Casting the Hayfield Northern's desire to reestablish rail service as an attempt to continue rail service misdirects the proper reading of the statutes involved: 49 USC secs. 10905 and 10903.

49 USC 10905 Reaches Rail Property that has Avoided Abandonment Under 49 USC 10903.

Section 10905 is entitled "Offers of financial assistance to avoid abandonment and discontinuance." This section provides two methods for a financially responsible entity to prevent abandonment of a line of rail. One method is that of subsidy (which was the method employed by the Shipper's Group on this line of rail) and the other method is purchase. Section 10905 contemplates uninterrupted continuation of rail service and continuation of federal regulation in the case of subsidy or purchase. Under sec. 10905 there is no abandonment and a federal interest persists. The C&NW conclusion that such federal law shields the line from a state condemnation proceeding *after* a certificate of abandonment issues under sec. 10903 is thus without basis.

On page 15 of its motion to affirm C&NW quotes the following language from the decision of the Court of Appeals:

> The elaborate procedural detail of this statutory scheme indicates that not only has Congress granted the Commission exclusive and plenary authority to regulate abandonments, *Chicago and North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311, 320 (1981), Congress has granted the Commission exclusive and plenary authority to provide for continuation of rail service in connection with abandonments, *Hayfield Northern R.R. Co., Inc. v. Chicago and North Western Transp. Co.*, 693 F.2d at 822 (J.S.App. A-7).

This statement is correct. The ICC has exclusive authority to provide continued rail service but by the very terms of the statute this continuation takes place *before* abandonment has been consummated. After an abandonment, evidenced by the

issuance of a certificate pursuant to sec. 10903, rail service is terminated and cannot be continued under sec. 10905. Following consummation of an abandonment, there is no remaining federal interest in the line and section 10905 cannot be viewed as preempting state process on that line. To contend otherwise is to contend that the line is forever subject neither to federal authority nor to state power.

There is Long Established Precedent that After Abandonment, Disposition of Rail Property is Subject to State Law.

C&NW ignores a prominent line of cases that hold that rail property after a certificate of abandonment issues is subject to processes of state law. See, e.g., *New Orleans Terminal Company v. Spencer*, 366 F.2d 160 (1966). Instead C&NW refers to cases that prohibit pre-abandonment interference, see e.g., *Chicago and North Western Transp. Co. v. Kalo Brick & Tile*, 450 U.S. 311 (1981).

A State Condemnation Proceeding Does Not Subject the Line of Rail to Protracted Abandonment Proceedings.

C&NW contends that a state condemnation proceeding would frustrate the congressional intent of protecting the railroads "from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." Motion to affirm at 15. This objective has nothing to do with the present situation. The state condemnation proceeding is not designed nor could it possibly affect the abandonment process. Condemnation is necessarily conditioned on abandonment proceedings being complete, i.e., condemnation follows abandonment. Actually, the abandonment proceedings of section 10903 are delayed by the procedures of section 10905, rather than by state condemnation.

CONCLUSION

For the reasons set forth in the jurisdictional statement and in light of the concerns set forth in the *amicus* pleadings of the Iowa Department of Transportation and the State of Wisconsin, plenary consideration is warranted.

Respectfully submitted,

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